

UNIT 52 PROTESTS

_____ has satisfactorily completed on-the-job training in the Part or Parts of this Unit specified below.

Certification for Part A: Agency Protests

Duty	Develop and forward a position on a protest to the agency. Prepare a memorandum for record to document resolution of the protest.
Conditions	Given a protest before or after award, the protested offer, all other offers (if after award), the solicitation, the contract file (including the PNM, if any), and support from the agency's legal staff.
Overall Standard(s)	Procure requirement in the most timely and efficient manner, given the protest. Meet all FAR, agency, and other procedural requirements. Include all relevant facts and provide factually correct data. Memorandum for record must meet the "test of sufficiency" (i.e., applying the reasonable man doctrine, a reader could reconstruct the protest and its resolution).
Evaluator	Name _____ Title _____ Date _____

Certification for Part B: Protests to GAO

Duty	Prepare the protest file and forward the file, along with other required information, to the GAO. Prepare a memorandum for record to document resolution of the protest.
Conditions	Same as Part A.

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Overall Standard(s) Procure requirement in the most timely and efficient manner, given the protest. Meet all FAR, GAO, agency, and other procedural requirements. Include all relevant facts and provide factually correct data. Memorandum for record must meet the "test of sufficiency" (i.e., applying the reasonable man doctrine, a reader could reconstruct the protest and its resolution).

Evaluator Name _____
Title _____
Date _____

Certification for Part C: Protests to the Courts

Duty Prepare an affidavit and memorandum of facts.

Conditions Given a court filing, the contract file (including the PNM, if any), and support from the agency's legal staff.

Overall Standard(s) Provide all relevant facts and provide factually correct data. Implement the court's decision.

Evaluator Name _____
Title _____
Date _____

Certification for Part D: Protests to SBA of Eligibility for a Set-Aside

Duty Develop or forward a protest to SBA.

Conditions Given a solicitation with a set-aside for small business concerns **or small disadvantaged business concerns**, the offer in line for award, data from market research or acquisition histories on the prospective awardee, and/or a protest from another party with regard to the awardee's size status.

Given a solicitation with a set-aside or preference for **small disadvantaged business concerns**, the offer in line for award, data from market research or acquisition histories on the prospective awardee, and/or a protest from another party with regard to the awardee's size status.

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Overall Standard(s) Unless necessary to protect the public interest, do not award to offerors which falsely represent themselves as eligible for a small business or small disadvantaged business set aside or other preference. Determine whether to initiate action as provided in FAR 19.301(d) absent SBA action against a business entity that has misrepresented its eligibility.

Evaluator	Name	_____
	Title	_____
	Date	_____

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DOCUMENTATION OF OJT ASSIGNMENT(S)
Description of Assignment:
Evaluation:
Completion Date:

UNIT 52 PROTESTS

DOCUMENTATION OF OJT ASSIGNMENT(S)
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Evaluation:
Completion Date:

As needed, insert additional pages to record OJT assignments.

UNIT 52 PROTESTS

Policies

<i>FAR</i>	<i>Agency Suppl.</i>	<i>Subject</i>
15.1004		Protests against award.
19.101 and 102		Size standards.
19.301		Representation by the offeror of status as a small business concern.
19.302		Protesting a small business representation.
19.501(k)		Protesting a representation as an organization for the handicapped.
22.6		Walsh-Healey Public Contracts Act--protests of representation.
33.1		Protests.
52.219-1 through 3		Representations as a small business concern, small disadvantaged business concern, or as a women-owned small business.
52.219-5		Notice of participation by organizations for the handicapped.
52.222-19		Walsh-Healey Public Contracts Act representation.
52.233-2		Service of protest.
52.233-3		Protest after award.

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Other KSA's

1. Knowledge of the small business thresholds in accordance with SBA size standards.
2. Knowledge of what is considered an "interested party" for the purposes of FAR.
3. Comprehension of agency/GAO/FAR standards for protests.
4. Ability to research previous GAO decisions and case law on protests.
5. Knowledge of typical issues in protests.
6. Samples of well prepared "findings of fact."
7. Knowledge of penalties for falsifying affidavits and memoranda of facts.
8. Knowledge of the role of the Claims court (pursuant to 28 U.S.C. §1491(a)(1)) and District court (pursuant to 5 U.S.C. §702 and 28 U.S.C. §1346(2)) in protest resolution
 - Who may protest (e.g., persons with implied contract for good faith consideration of offer in the case of the court of claims).
 - Jurisdiction.
 - Time of protest.
 - Procedure.
 - Burden of proof.
 - Standard of review.
 - Interim remedies.
 - Remedies.
 - Appeals.
9. Definitions for "day" and "filed."

☞ *"Day"* is expressly defined as meaning "calendar" day, unless otherwise specified. To calculate a period of time, start the clock on day two after the "act, event, or default from which the designated period of time begins to run". Stop the clock one day after the end of the period, unless:

- That day is a Saturday, a Sunday, or a legal holiday (in which case, carry the period over to the next business day); or
- In the case of a filing of a paper at any appropriate administrative forum, that day is a day on which weather or other conditions causes the closing of the forum for all or part of the day. In that case, stop the clock on the very next day that the administrative forum opens its doors for business.

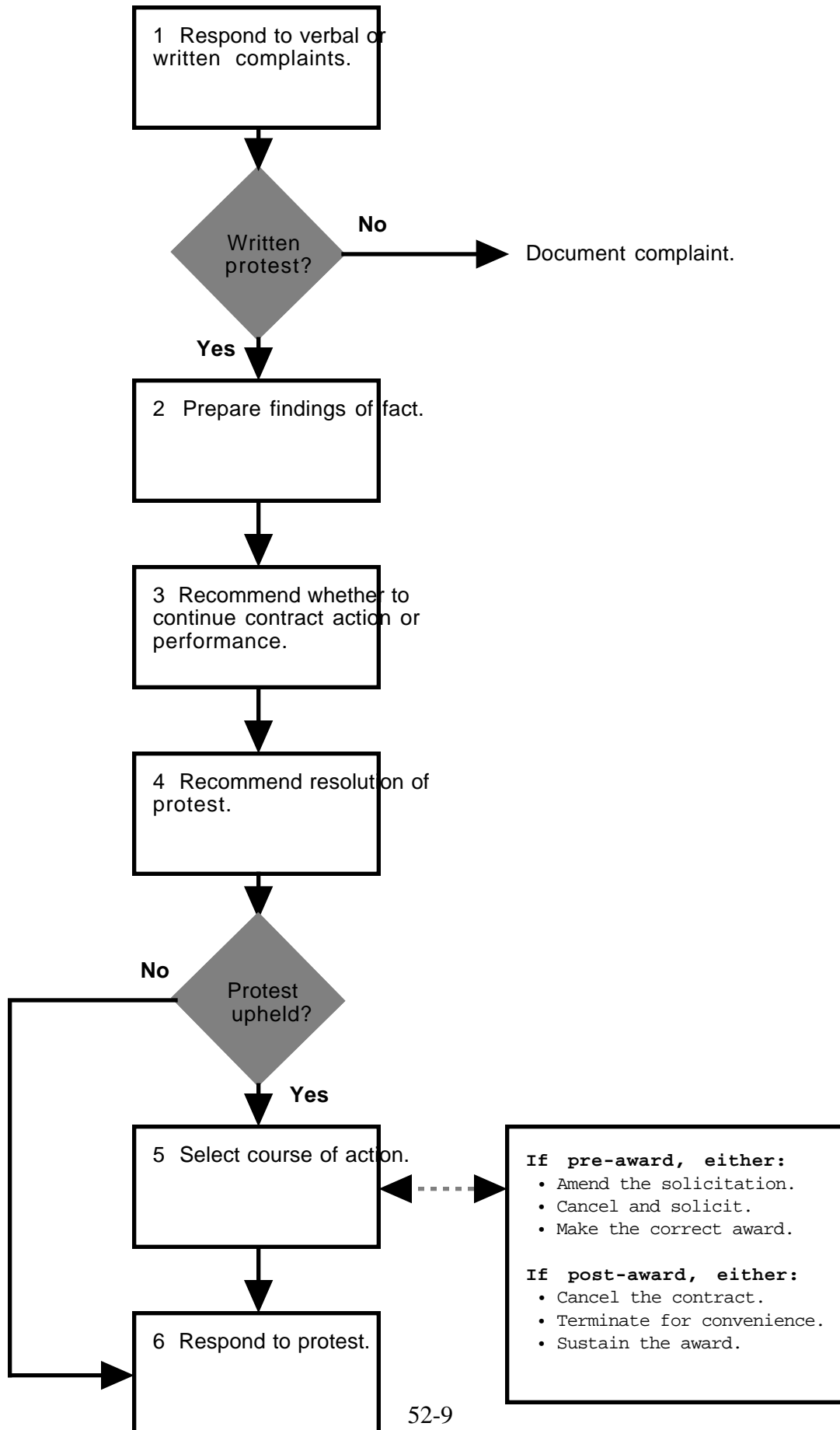
However, when calculating the time period for filing a protest that would result in a suspension, the clock can stop on a Saturday, Sunday, or legal holiday. This applies both to the 5-day period after a debriefing date and the 10-day period after contract award.

"Filed" with the agency means the complete receipt of any document by an agency before its close of business. Documents received after close of business are considered filed as of the next day. Unless otherwise stated, the agency close of business is presumed to be 4:30 p.m. local time. *"Filed"* with the GAO means the receipt by GAO by 5:30 p.m., eastern time. [4 CFR §21.0]

UNIT 52 PROTESTS

These definitions are critical in determining whether a protest is timely or not, as well as in determining other timeframes for actions by interested parties and the protest forum.
[§33.101, FAC 90-32, Case 94-730, CSW Unit 52, all tasks]

Other Policies and References (Annotate As Necessary):



UNIT 52 PROTESTS

Part A: Agency Protests

Tasks

Related Standards

<p>1. Respond to a verbal complaint about the acquisition.</p> <ul style="list-style-type: none">• Ask questions to clarify the complaint.• Explain the Government's version of the facts.• Where necessary, break conversation for factfinding.• Advise the contractor of the procedure for submitting a written protest.	<p>A1. Provide accurate data and only that information which is directly relevant to the complaint. Only disclose data that would be available to the vendor under the Freedom of Information Act. Do not disclose data that would give the firm an unfair competitive edge in the current or future procurements. Correctly advise the complainant of requirements in FAR 33.103(b) for submitting written protests.</p>
<p>2. If a written protest is received, prepare findings of fact.</p> <ul style="list-style-type: none">• Determine whether protest is timely.• Recognize claimed basis for protest (issues).• Determine whether protest is factually correct.• Determine whether the protest satisfies the requirements of FAR 33.103(b).	<p>A2. Make correct determinations on matters of fact. To be timely, a protest of alleged improprieties in a solicitation which are apparent prior to bid opening date or RFP's closing date shall be filed prior to that date. In all other cases, protests must be filed not later than 10 working days after the basis of the protest is known, or should have been known. However, an agency may consider an untimely protest.</p>

☞ Protesters now must file protests not later than 14 days, rather than 10 working days, after the basis of the protest is known or should be known (although a contracting officer — for good cause shown or where the protest raises significant issues — may consider late protests). [§33.103(b), FAC 90-32, Case 94-730]

☞ Before, the agency could reject any protest that was not concise or logically presented. Now, the protest must “substantially” fail one or the other of these tests. [§33.103(b), FAC 90-32, Case 94-730.]

☞ Interested parties may protest cancellations of solicitations. Interested parties also may protest cancellation or termination of award, if the protester alleges in writing that the termination or cancellation is based in whole or in part on improprieties concerning the award of the contract. This has long been accepted practice but is now explicit in the FAR. [§33.101, FAC 90-32, Case 94-730]

UNIT 52 PROTESTS

Part A: Agency Protests

Tasks

Related Standards

<p>3. Recommend whether or not to continue the contract action or performance.</p> <ul style="list-style-type: none"> • If the protest was filed prior to award, recommend whether to proceed with award or delay award (based on potential injury to the Government). • If the protest was filed after award only with the agency, determine whether to suspend or terminate contract performance pending the outcome of the protest. 	<p>A3. Only proceed with award if the CO determines, in writing, that:</p> <ul style="list-style-type: none"> • The supplies or services are urgently required, • Delivery or performance will be unduly delayed by failure to award promptly, or • A prompt award would otherwise be advantageous to the Government. <p>If award will be withheld pending disposition of the protest, notify all offerors which appear to have a reasonable prospect of receiving award and secure extension of the Government's power of acceptance (i.e., no cost extension of offers) per Unit 31.</p>
<p>4. Recommend resolution (or refer to protest control office for resolution).</p> <ul style="list-style-type: none"> • Research and identify the most recent and pertinent Comptroller General decisions/cases. • Decide whether to deny or uphold the protest. 	<p>A4. Your recommendation should be factually correct, validly derived from the facts, and reflect the most recent and pertinent Comptroller General decisions. Findings of fact and recommendations, taken together, should meet the procedural requirements of FAR Part 33 and agency policies.</p>
<p>5. If the decision is to uphold the protest, select course of action.</p> <ul style="list-style-type: none"> • Preaward: <ul style="list-style-type: none"> - Amend solicitation (prior to opening). - Cancel solicitation and resolicit. - Make correct award. • Postaward: <ul style="list-style-type: none"> - Cancel the contract (per Unit 76). - Terminate for convenience (per Unit 76). - Sustain the award. 	<p>A5. Meet procedural requirements of FAR, Part 33 (including notice of appeal rights). Only suspend or terminate contract performance if (1) the award will probably be invalidated and (2) the delay in delivery will not harm the Government's interests.</p>

☞ If the protest is upheld, the agency head can take any action available to the Comptroller General pursuant to upholding a bid protest and [pay appropriate costs as stated in Section 33.104\(h\)](#). This includes payment of the [protester's costs, exclusive of profit](#), of filing and pursuing the protest, including reasonable attorney, consultant and expert witness fees, and bid and proposal preparation costs. [The agency shall use funds available for the procurement to pay the costs awarded.](#) Prior to this FAR change, whether agencies have had such authority has always been in question. There is no point in going through the GAO process if the protester's only reason for going to GAO is to obtain reimbursement for attorney fees. [§33.102(b), FAC 90-32, Case 94-7300.]

UNIT 52 PROTESTS

Part A: Agency Protests

Tasks

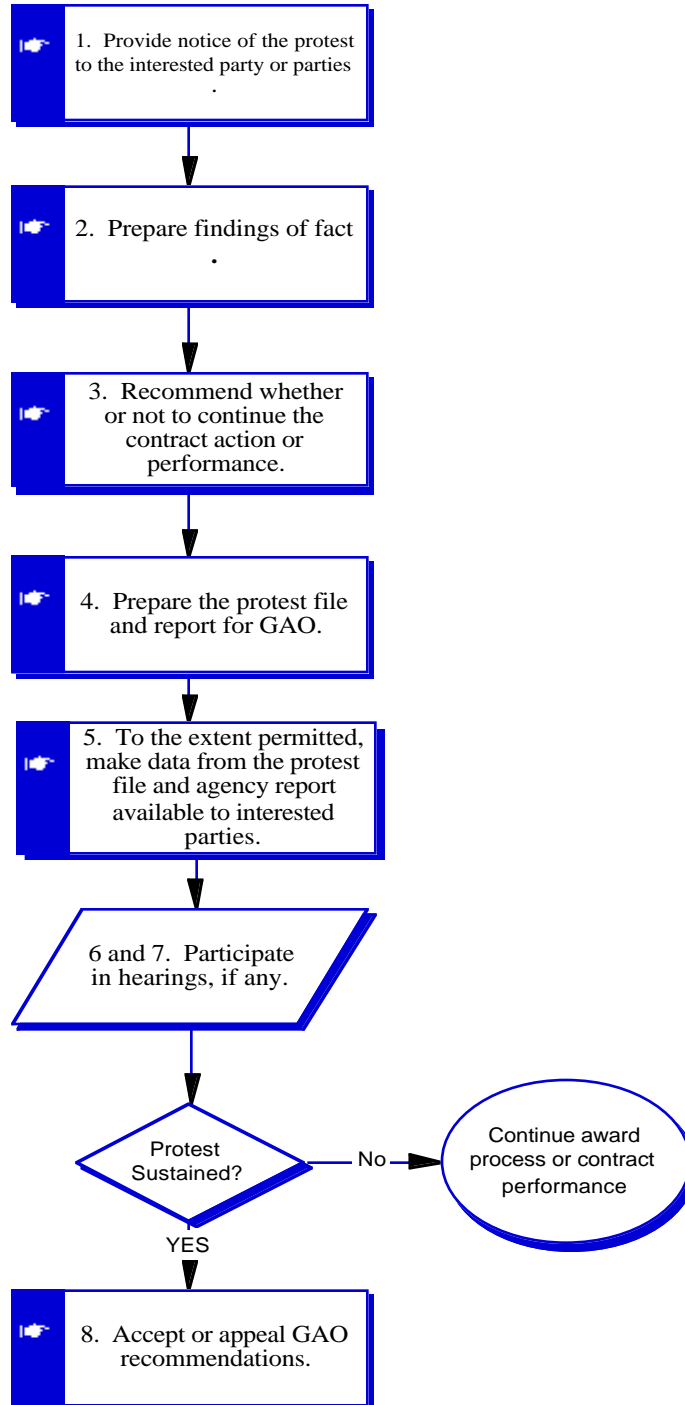
Related Standards

6. Respond to protest.	
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☞ Furnish a copy of the protest ruling by certified mail return receipt requested or by any other method that provides evidence of receipt. [§33.102(b), FAC 90-32, Case 94-7300. CSW Unit 52, Task A6]

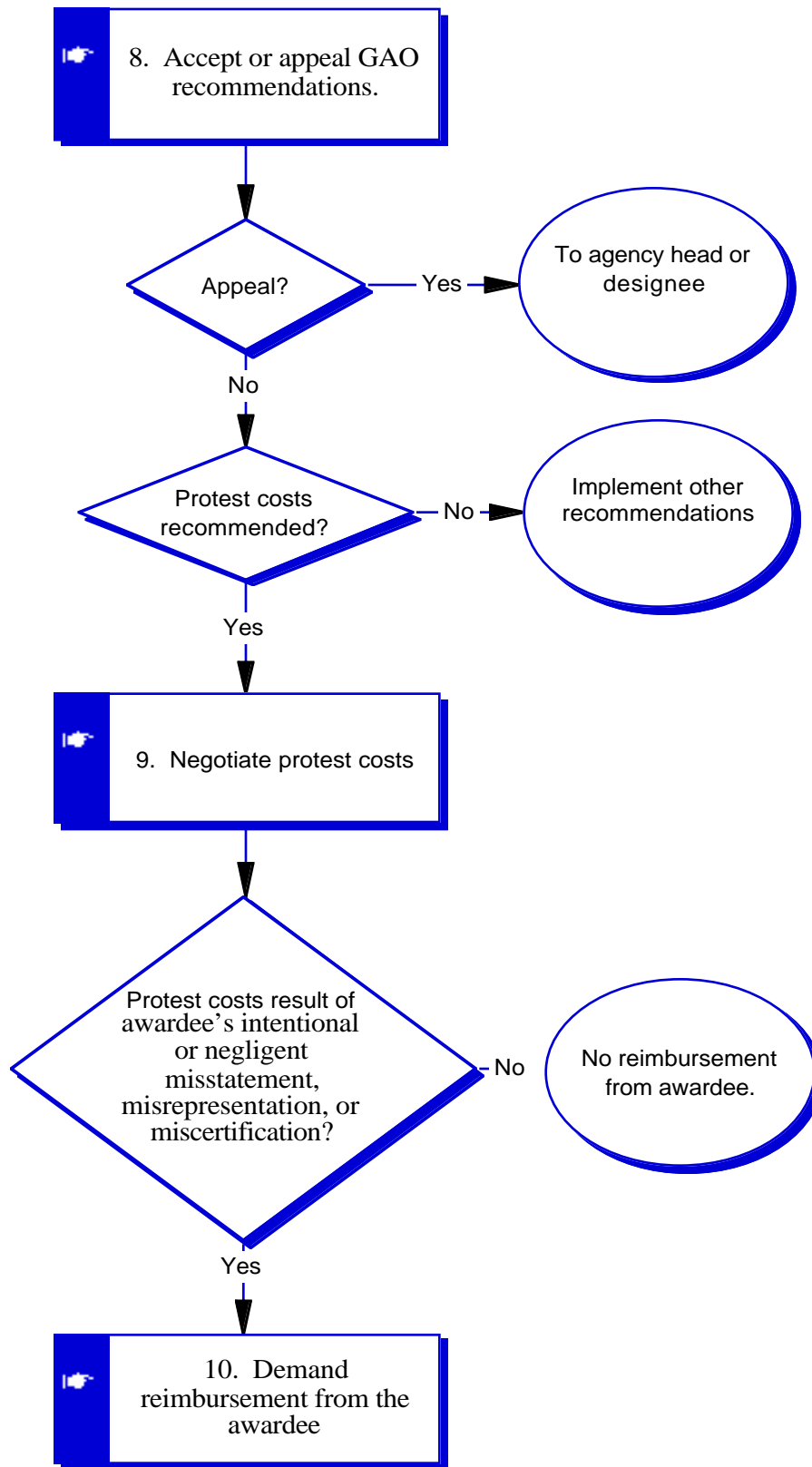
In the past, when the protest would arrive at GAO, the Government often did not know when the protester had received the CO's decision in response to an agency protest, because the response had been sent by first class mail. Thus, the Government would not know when the time period for filing the protest had expired. Hence, we need evidence of the date and time of receipt by the protester. Certified mail is one solution. Or you can fax the agency response where the fax automatically generates the message received sheet. Or by e-mail, where there is an electronic, save to disk message that the recipient has received the message.

PROTESTS TO GAO



Flowchart Continued On Next Page

Flowchart Continued From Prior Page



UNIT 52 PROTESTS

Part B: Protests to GAO

Tasks

Related Standards

<p>1. Provide notice of the protest to the interested party or parties.</p> <ul style="list-style-type: none"> • If award has been made, notify the contractor. • If award has not been made, (1) notify all offerors who appear to have a reasonable prospect of receiving award and (2) secure extension of the Government's power of acceptance (i.e., no cost extension of offers) per Unit 31. 	<p>B1. Give notice within 1 work day after its receipt by the agency. Furnish copies of the protest to the party(ies). Instruct the party(ies) to (1) communicate directly with GAO and (2) provide copies of any such communication to the agency and the other known participating parties. Note that funds will remain available for obligation for 90 working days after the date on which the final ruling is made on the protest.</p>
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☞ Furnish a “redacted” version of the protest to other interested parties when the protester has requested a protective order for “sensitive” material therein. The protester is responsible for preparing the “redacted” version and furnishing that version to GAO. [§33.104(a)(2), FAC 90-32, Case 94-730 & also 4 CFR §21.1(f)].

☞ If award has not been made, the contracting officer has to notify “all parties who appear to have a reasonable prospect of receiving award if the protest is denied”. The test used to be “substantial and reasonable”. [§33.104(a)(2), FAC 90-32, Case 94-730].

<p>2. Prepare findings of fact .</p> <ul style="list-style-type: none"> • Determine whether protest is timely. • Recognize claimed basis for protest (issues). • Determine whether protest is factually correct. 	
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☞ What governs? FAR or GAO’s Bid Protest Regulations? Answer: GAO’s Regulations, as published at 4 CFR 21. [§33.104, FAC 90-32, Case 94-730]

☞ Interested parties may protest cancellations of solicitations. Interested parties also may protest cancellation or termination of award, if the protester alleges in writing that the termination or cancellation is based in whole or in part on improprieties concerning the award of the contract. This has long been accepted practice but is now explicit in the FAR. [§33.101, FAC 90-32, Case 94-730]]

UNIT 52 PROTESTS

Part B: Protests to GAO

Tasks

Related Standards

<p>3. Recommend whether or not to continue the contract action or performance.</p> <ul style="list-style-type: none"> • If the protest was filed prior to award, recommend whether to proceed with award or delay award (based on potential injury to the Government). • If the protest was filed after award only with the agency, determine whether to suspend or terminate contract performance pending the outcome of the protest. 	<p>B4. Do not award pending outcome of the protest unless the head of the contracting activity finds in writing that (a) urgent and compelling circumstances which significantly affect the interest of the U.S. will not permit waiting for a GAO decision and (b) award is likely to occur within 30 calendar days of the written finding.</p> <p>If notice of protest is received within 10 calendar days after award¹, suspend or terminate the contract, unless the head of the contracting activity finds in writing that (a) contract performance will be in the best interest of the U.S. or (b) urgent and compelling circumstances which significantly affect the interest of the U.S. will not permit waiting for a GAO decision. Also suspend or terminate the contract, absent an HCA finding to the contrary, if you if you receive notice of a protest from the GAO within 5 days after the debriefing date offered to the protester if (1) the protester asked for a debriefing and (2) the Government was required to provide the requested debriefing.</p> <p>Do not award or authorize performance prior to notifying GAO. Provide written notice to the protester and other interested parties of any determination to award or continue performance.</p>
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✎ In protests after award, suspend performance or terminate the awarded contract — absent a written determination to the contrary by the Head of the Contracting Activity (HCA) per FAR 33.104(c)(2)) — if you receive notice of a protest from the GAO within 5 days after the debriefing date offered to the protester if (1) the protester asked for a debriefing and (2) the Government was required to provide the requested debriefing. In this case, you must suspend performance or terminate the awarded contract even if more than 10 days have passed since award of the contract. [§33.104(c), FAC 90-32, Case 94-730 & also 4 CFR §21.6(c).].

✎ Within the period for timely filing of a protest to GAO, contracting officers may stay performance of a contract upon a written determination (1) that a protest is likely and (2) that delaying performance is in the Government's best interests. At issue is the Government's

¹If the protest is not timely, you may still suspend or terminate if the CO believes that the award may be invalidated and if delay will not be prejudicial to the Government's interests.

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Part B: Protests to GAO


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liability if the contractor begins performance and then has to stop as the result of an actual filing (if a protest is in fact filed). There is no liability if you stay the award.

Note— If immediately prior to award, you believe that the likely protester has good reason for a protest and that the likely protest should be sustained, consider immediate corrective action at the agency-level (e.g., cancel and resolicit rather than award). [§33.102(d), FAC 90-32, Case 94-730.]

<p>4. Prepare the protest file and report for GAO.</p> <p>Include as part of the protest file:</p> <ul style="list-style-type: none">• An index of all documents.• The protest.• The offer of the protesting offeror and the offer being considered for award or protested.• The solicitation, including specifications or portions relevant to the protest.• All relevant evaluation documents.• Abstract of offers or relevant portion.• Any other relevant documents, including documents specifically requested by the protestor. <p>In addition to the protest file, prepare and forward as part of the report to GAO—</p> <ul style="list-style-type: none">• The contracting officer's signed statement of the relevant facts (i.e., findings of fact, actions taken, recommendations, and any additional evidence or information necessary to determine the protest's validity).• A memorandum of law.• List of other parties receiving a copy of the report.• List of documents withheld from the protester and other interested parties (annotated to identify any specifically requested by the protester) and reasons for withholding.• Any determinations for continuing the contract action or performance after receipt of the protest.	<p>4. In preparing and forwarding the report, comply with FAR 33.104(a)(3).</p> <p>Also keep GAO apprised of the name, title, and phone number of agency official(s) knowledgeable about the protest's subject matter.</p>
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 The FAR identifies the documents that are part of a “protest file” — and differentiates those documents from other information in the administrative report to GAO.

Protest files include:

- An index of all documents.
- The protest.

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Part B: Protests to GAO

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- The offer of the protesting offeror and the offer being considered for award or protested.
- The solicitation, including specifications or portions relevant to the protest.
- All relevant evaluation documents.
- Abstract of offers or relevant portion.
- Any other relevant documents, including documents specifically requested by the protester.

In addition to the protest file, the administrative report to GAO includes:

- The contracting officer's signed statement **of the relevant facts** (i.e., findings of fact, actions taken, recommendations, and any additional evidence or information necessary to determine the protest's validity).
- **A memorandum of law.**
- List of other parties receiving a copy of the report.
- List of documents withheld from the protester and other interested parties (annotated to identify any specifically requested by the protester) and reasons for withholding. [§33.104(a)(3), FAC 90-32, Case 94-730.]

👉 Agencies used to have 25 “**working**” days to deliver the “agency administrative” report to GAO (or 10 if GAO uses the “express option”). The timeframes are now 35 and **20** (for the express option) days as the term “day” is now defined at FAR §33.101. Since the new definition of day is geared to calendar days rather than working days, the new timeframes are basically equivalent to the prior timeframes. [§33.104(a)(3), FAC 90-32, Case 94-730.]

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Part B: Protests to GAO

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Related Standards

<p>5. To the extent permitted, make data from the protest file and agency report available to interested parties.</p> <p>Reasons for withholding may include (among others):</p> <ul style="list-style-type: none"> • Document already furnished to or was prepared by the party. • Data are classified. • Data would give the party a competitive advantage. • Protester's documents withheld from other interested parties pursuant to law or regulation. 	<p>5. Other than for the protester, provide a copy of the report only to parties that responded to the notice (see Task 1).</p> <p>Determine whether to seek a protective order from GAO for agency documents. For documents covered by a GAO protective order, only furnish copies as provided in that order.</p> <p>If, within two work days after receipt of the agency report, the protester requests additional documents, provide said documents to GAO within 5 working days of receipt of request. Determine whether to also furnish the documents to the protester and other interested parties. Notify GAO of any documents withheld from the protester and other interested parties, along with reasons for withholding.</p>
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✎ After the protester receives the administrative report, the protester may ask for additional [documents](#). This request is timely only if made “[within 2 days after the protester knew the existence or relevance of additional documents, or should have known](#)”. Before, the protester had to ask for the documents within the two day period following the protester’s receipt of the administrative report. [§33.104(a)(4)(ii)(A), FAC 90-32, Case 94-730.]

✎ You must provide actual or prospective offerors reasonable access to the protest file, other than for information exempt from disclosure under a GAO protective order (if any) and the Freedom of Information Act (section 552 of title 5, U.S.C.). Such access can be denied, however, [if the GAO dismisses the protest before the documents are submitted to the GAO](#). Make the file available to “nonintervening actual or prospective offerors” within [a reasonable time after submittal of an agency report to the GAO](#). [§33.104(a)(3)(ii), FAC 90-32, Case 94-730 and 4 CFR §21.3(c)]

✎ GAO protective orders establish terms, conditions, and restrictions on disclosure of information related to the protest. Protected information includes procurement sensitive information, trade secrets or other proprietary or confidential research, and development or commercial information (i.e., basically the same information protected under the Freedom of Information Act). Protective orders may not bar disclosure to the Congress (under Congressional oversight authority) or an executive agency, such as the Small Business Administration, under its oversight authority. The policies are new to the FAR but in fact are not really different in substance from prior practice. [§33.104(a)(5), FAC 90-32, Case 94-730 and also 4 CFR §21.3(d)]

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Part B: Protests to GAO

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Related Standards

6. Participate in hearings, if any, scheduled by GAO.	6. Prepare comments necessary on the he
7. Prepare comments on the hearing.	7. File comments within 7 working days of the hearing.
8. Upon receipt of GAO's recommendation: <ul style="list-style-type: none"> • Accept and implement the recommendation, or • Appeal to the head of the agency or his/her designee. Recommendations may include: <ul style="list-style-type: none"> • No exercise of options. • Termination. • Recompetition. • New solicitation. • Award consistent with statute and regulation. • Other. 	8. Appeal only when (1) the case is solid and (2) the requiring activity is willing to present and defend "magnitude of injury" or protests costs appear unreasonable. File a report with the Comptroller General within 65 days of receipt of GAO's recommendation if the agency has not fully implemented the GAO recommendations.

☞ GAO has the same amount of time to issue a decision generally (notwithstanding the switch from working days to calendar days), but can take more time to issue a decision under the express option.

- Ordinarily, GAO has to issue a decision in 125 calendar days (vs. the prior 90 “working” days).
- Under the express option, GAO has 65 calendar days to issue a decision (vs. the prior 45 calendar days). [§33.104(f), FAC 90-32, Case 94-730 & also 4 CFR §21.9. CSW Unit 52, Task B8]

☞ If the agency has not fully implemented the GAO recommendations within 60 days of receipt, the head of the contracting activity (HCA) must report its failure within 5 days (i.e., no later than 65 days following receipt of the recommendations). The report shall explain the reasons why the GAO's recommendation exclusive of costs, has not been followed by the agency.

In the past, the HCA had to file a report with GAO within 60 days of receipt of the recommendations if, and only if, the HCA decided not to comply with the recommendation. Now, the report must be filed even if the HCA has accepted the recommendations but not yet fully implemented them (which is likely to be the case for such recommendations as recompeting the contract). [§33.104(f), FAC 90-32, Case 94-730. CSW Unit 52, Task B8]

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Part B: Protests to GAO

Tasks

Related Standards

9. Negotiate protest costs.	B9. If applicable, do not exceed limits on attorney fees, consultant fees, or expert witness fees.
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☞ If the protest is upheld, reimbursable protester's costs are exclusive of profit. The agency must use funds available for the procurement to pay the costs awarded.

Examples of protest costs now include consultant and expert witness fees. However, the FAR also specifies limits on attorney (basically \$150 an hour, with some flexibility to pay a higher rate under some circumstances) fees and on consultant and expert witness fees (i.e., “the highest rate of compensation for expert witnesses paid by the Government pursuant to 5 U.S.C. 3109 and Expert and Consultant Appointments, 60 FR 45649, September 1, 1995 (CFR 304.105)”) that apply to all but small business concerns. Moreover, treat the cap on attorneys' fees as a benchmark in determining what is a "reasonable" level for attorneys' fees for small businesses. [§33.104(h), FAC 90-32, Case 94-730.]

☞ When GAO recommends payment of protest costs, the FAR instructs the agency and protester to negotiate an agreement on the quantum. Contractors may NOT include any paid protest costs in subsequent proposals, billings, or claims against the Government. Reflect those exclusions in the cost agreement.

If the negotiations fail, the protester can ask GAO to recommend an amount. If the agency fails to pay that amount, the agency must “promptly” report its rationale to GAO. [§33.104(h), FAC 90-32, Case 94-730. CSW Unit 52, Task B9]

The proposed GAO regulation requires the protester to file a claim for costs, detailing and certifying the time expended and costs incurred, with the contracting agency within 90 days after receipt of GAO's recommendation that the agency pay the protester its costs. If the contractor fails to meet that deadline, it forfeits its rights to recover costs (unless it can persuade GAO to consider an untimely claim for good cause shown). If the agency and protester fail to reach agreement on the claim, GAO can recommend that the agency also pay the protester the costs of pursuing the claim for costs before GAO. Finally, the contracting agency must notify GAO within 60 days of receipt of the recommendation of its actions pursuant to that recommendation. (4 CFR §21.8)


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Part B: Protests to GAO

Tasks

Related Standards

<p>10. Demand reimbursement from the awardee of protest costs to the extent those costs resulted from the awardee's intentional or negligent misstatement, misrepresentation, or miscertification.</p> <p>Subtasks:</p> <ul style="list-style-type: none"> Determine whether to demand reimbursement of such costs. Determine whether to recover such costs by offset against the contract, another contract with the awardee, or by other available means. If the contracting officer's decision is to demand reimbursement, <u>notify the contractor in writing of the nature and amount of the debt, and the intention to collect by offset if necessary.</u> <u>Prior to issuing a final decision, afford the contractor an opportunity to (a) inspect and copy related agency records to the extent permitted by statute and regulation and (b) request review of the matter by the head of the contracting activity.</u> 	<p>B10. Correctly determine whether a post award protest was sustained as the result of an awardee's intentional or negligent misstatement, misrepresentation, or miscertification. Accurately calculate the amount of the protest cost paid by the Government that resulted from such misstatement, misrepresentation, or miscertification (vs. that amount, if any resulting from other causes).</p>
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 The Government is authorized to recover protest costs from the awardee when the agency sustains a post award protest because of the awardee's intentional or negligent misstatement, misrepresentation, or miscertification. The Government may recover such costs by offsets against the contract. Also consider referring the matter to the agency's debarment official.

Steps in recovering protest costs:

- Determine whether to demand reimbursement (given such factors as amount of the debt, degree of the awardee's fault, and costs of collection).
- Determine whether to recover such costs by offset against the contract, another contract with the awardee, or by other available means.
- If the contracting officer's decision is to demand reimbursement, the contracting officer shall notify the contractor in writing of the nature and amount of the debt, and the intention to collect by offset if necessary.
- Prior to issuing a final decision, the contracting officer shall afford the contractor an opportunity to (a) inspect and copy related agency records to the extent permitted by statute and regulation and (b) request review of the matter by the head of the contracting activity.

[§32.602(h), 33.102(b)(3), 33.104(h)(7), 33.105(g)(5) and 52.233-3, FAC 90-32, Case 94-731. CSW Unit 52, Task B10]

Often as the result of discovery during a protest, the Government learns of intentional or negligent misstatements, misrepresentations, or miscertifications by the awardee that could not have been reasonably known to agency evaluators prior to award. A protest may be sustained

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Tasks

Related Standards

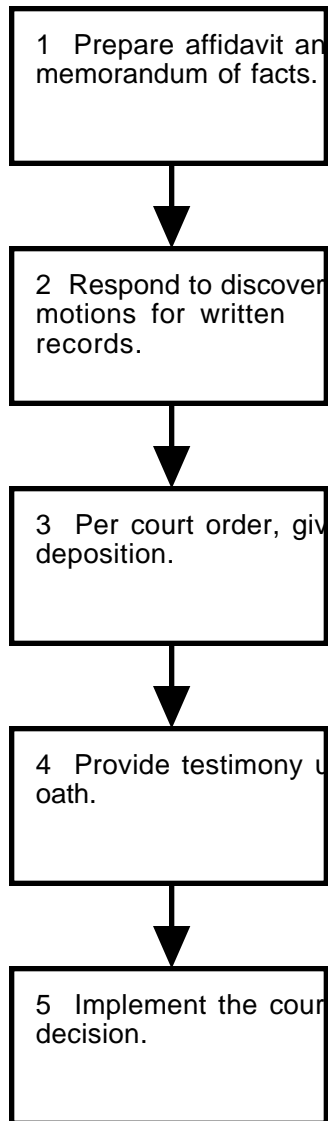
where the award has been induced by a material misrepresentation by the awardee. Contracting activities have been without effective remedy in such cases. Theoretically, the agency could ask the Department of Justice to file a lawsuit against the offeror making the misrepresentations. However, due to the heavy workload of the Justice attorneys, this is not a practical alternative.

The FAR change does not adversely affect any substantive right of an offeror. Under the proposed language, the Government remedy is to offset such costs on the same or an unrelated contract. If the offeror believes that the offset is not justified, it may appeal the action to the agency, or under the Contract Disputes Act to either a Board of Contract Appeals or the Court of Federal Claims.

UNIT 52 PROTESTS

Part C: Protests to the Courts

Part C: Protests to the Courts



UNIT 52 PROTESTS

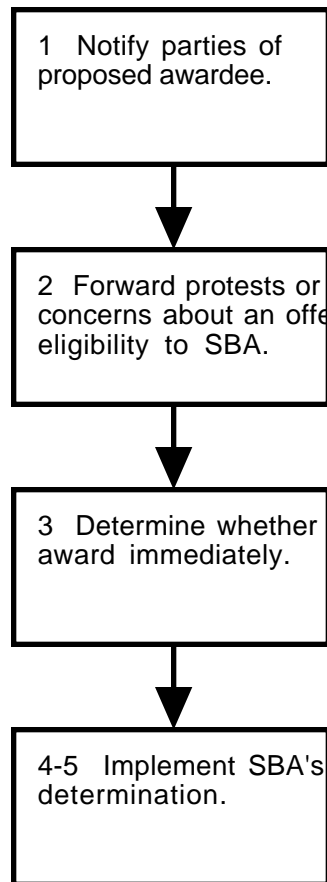
Part C: Protests to the Courts

Tasks

Related Standards

1. Upon notification of court filing (temporary restraining order; preliminary and/or final injunction), prepare affidavit and memorandum of facts (equivalent to findings of fact).	
2. Respond to discovery motions for written records (including justification for withholding of any data).	
3. Per court order, give deposition (under oath, responding to examination from plaintiff's attorney).	
4. Provide testimony under oath, as directed by the judge.	
5. Implement the court's decision	

Protests to SBA of Eligibility for a Set-Aside



UNIT 52 PROTESTS

Part D: Protests to SBA of Eligibility for a Set-Aside

Tasks

Related Standards


1. Prepare notices to interested parties identifying proposed awardee (for negotiated procurements).	E1. Notices should be prepared and distributed per agency policy.
2. Forward to SBA the names of any offerors (or subcontractors) which certified themselves as small businesses but are questionable. <ul style="list-style-type: none"> By the Contracting Officer (based on market research and acquisition histories, per Unit 5). By unsuccessful offerors or other interested parties (e.g., the contractor, with respect to a subcontractor). 	E2. Accept no protest from other interested parties unless made within 5 days after public opening or within 5 days after issuing the preaward notification (see Unit 50). Protests must be in writing (although a written protest can be accepted if it is post-marked no later than one day after an oral protest that has been tendered within the 5 day period).
2. Forward to SBA any protest of award from another offeror or interested party which challenges the claim of an awardee to being an organization for the handicapped.	E2.1 Section 133 of P.L. 100-590 authorizes public and private organizations for the handicapped to participate for FYs 1989-1993 in acquisitions set-aside for small business concerns. Reject protests that arrive later than five working days after bid opening or receipt of the notice of award (per Unit 50).
3. Determine whether to withhold award pending outcome of the protest. <ul style="list-style-type: none"> Withhold award for at least 10 workdays for protests of small business status or at least 15 days for protests of SDB status (or until SBA renders its verdict, whichever comes first), or Prepare determinations to award immediately. <ul style="list-style-type: none"> Notify SBA of award. Notify protesters. 	E3. Award immediately if necessary to protect the public interest. Otherwise, withhold award as long as practical pending receipt of SBA's determination.
4. Implement or appeal the SBA recommendation.	E4.
5. Initiate action under section 16(d) of the Small Business Act (see 13 CFR 124.6) if a business entity has misrepresented itself to obtain a set-aside or an 8(a) contract.	E5. Per FAR 19.301(d).

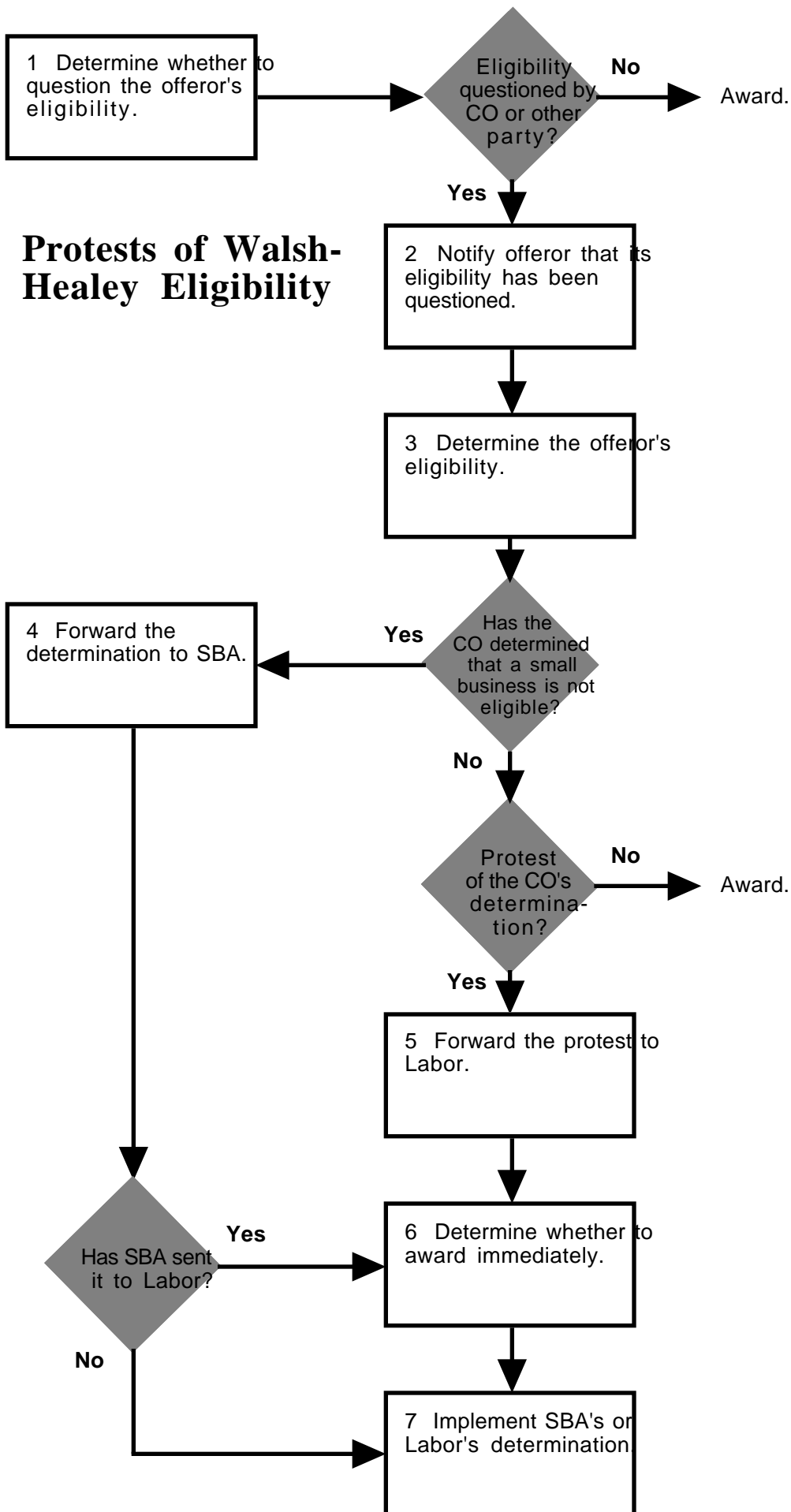
UNIT 52 PROTESTS

Part D: Protests to SBA of Eligibility for a Set-Aside

Tasks

Related Standards

-  When performing the **following** functions, the FAR requires contracting officers to separately consider the interests of women-owned small business concerns (kindred to the consideration provided to the interests of small disadvantaged business concerns and to small business concerns generally). [FAC 90-32, Case 94-780]
- *Protests to SBA of Eligibility for a Set-Aside* — Under §19.301 and §19.703, taking action against a firm that has misrepresented itself to obtain a subcontract under a subcontracting plan.



UNIT 52 PROTESTS

Part E: Protests of Walsh-Healey Eligibility

Tasks

Related Standards

<p>1. Determine whether to reject the offer or question the offeror's eligibility under Walsh-Healey.</p>	<p>F1. Reject the offer if:</p> <ul style="list-style-type: none"> • The offeror's representation indicates that it is not a manufacturer or regular dealer of the supplies offered, or • It qualifies or places a reservation on the representation and stipulations to avoid full compliance with the Act. <p>Question the eligibility of the offeror if:</p> <ul style="list-style-type: none"> • You have knowledge (e.g., from market research per Unit 47) that raises the question of the validity of the representation, • A protest has been lodged by another offeror prior to award, • The offeror in line for award has not previously been awarded a contract subject to the Act by the individual acquisition office, or • A preaward investigation or survey of the offeror's operations is otherwise being made to determine the technical and production capability, plant facilities and equipment, and subcontracting and labor resources of the offeror.
<p>2. Notify interested parties that the Walsh-Healey eligibility of the offeror in line for award has been questioned.</p>	<p>F2. Provide notice in writing to the offeror in line for award that:</p> <ul style="list-style-type: none"> • Its eligibility for award has been questioned and the specific reasons therefore, and • To be considered for award, it must submit evidence that affirms its eligibility to the contracting officer within 10 working days. <p>If a protest has been lodged by another offeror prior to award, notify the protester in writing that evidence concerning the matter may be submitted to the contracting officer within 10 working days.</p> <p>Notify other offerors whose offers might become eligible for award that the award is to be held up pending a determination of the apparently successful offeror's eligibility, and request them to extend their acceptance period, if necessary (per Unit 31).</p>

UNIT 52 PROTESTS

Part E: Protests of Walsh-Healey Eligibility

Tasks

Related Standards

<p>3. Determine the offeror's eligibility.</p>	<p>F3. Correctly apply the criteria in FAR 22.606. Consider all available factual evidence, including data from such sources as:</p> <ul style="list-style-type: none"> • The offeror and the protester (if any). • Preaward surveys. • Other acquisition offices. • The cognizant contract administration office. • An on site survey conducted specifically for this purpose. <p>After making the determination, notify the apparently successful offeror and the protester (if any) of the determination and the procedure to be followed if either party disagrees with the decision.</p>
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 Walsh-Healy does not apply to contracts for commercial items. (94-170)

<p>4. If the offeror is a small business, forward a determination of ineligibility to SBA.</p>	<p>F4. Forward this determination to SBA even if the offeror does not protest the determination.</p>
<p>5. Otherwise, forward any protest of the CO's determination to the Department of Labor.</p> <p>Include:</p> <ul style="list-style-type: none"> • The protest. • All pertinent material. 	<p>F5. Forward a protest to the Administrator of the Wage and Hour Division only if:</p> <ul style="list-style-type: none"> • The offeror protests a determination of ineligibility, or • Another offeror protests a determination of eligibility.

UNIT 52 PROTESTS

Part E: Protests of Walsh-Healey Eligibility

Tasks

Related Standards

6. Determine whether to award pending the outcome of a Labor's review.	<p>F6. Award immediately if the contracting officer certifies in writing, and the certification is approved as required by agency regulation, that—</p> <ul style="list-style-type: none">• The items to be acquired are urgently required, or• Delay of delivery or performance by failure to make the award promptly will result in substantial hardship to the Government. <p>When award is made, document the contract file to explain the need for making the award before a determination of the offeror's eligibility by the DOL and give prompt written notice of the decision to award to the DOL and, as appropriate, the protester, the SBA, and other concerned parties.</p>
7. Implement the SBA or Labor determination on the offeror's eligibility.	